IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 43.

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I.

There Is No Constitutional Defect in Jurisdiction.

Respondent's argument (Resp. Br. 8-9) that the Court lacks jurisdiction herein because the treble-damage provision of the antitrust laws is unconstitutional was shown to be without merit in Petitioner's brief in opposition to the motion to dismiss. The extremely serious effect of sustaining the motion is shown by a recent report of Warren Olney III, Director of the Administrative Office of the United States Courts. In fiscal year 1967 there were 536 new private antitrust suits. In the same year

government enforcement resulted in the filing of only 39 civil and 16 criminal suits. Trade Regulation Reports—Number 328, p. 3, Oct. 9, 1967.

II.

Petitioner's Right to Reversal Is Not Nullified by Any Pleading Defect.

Respondent's contention (Resp. Br. 10-17) that grounds for reversal are not available to Petitioner because of a pleading defect is wholly without merit. The day is gone when the pleader had to select the right legal theory at his peril. Under modern practice the purpose of the complaint is to provide the defendant with fair notice in order that he can answer and prepare for trial, Moore's Federal Prac., 2d Ed., Vol. 2-a, Par. 8.13. The complaint should state what happened; the court will apply the law to the facts, Moore's Federal Prac., 2d Ed., Vol. 2-a, Par. 8.12.

Every fact proved and relied upon by Petitioner at every stage in his requests for a judgment of liability as a matter of law was alleged in the complaint, as will appear from a comparison of paragraphs 4-15 of the original complaint (R. 2-5) and paragraph 1 of the supplemental complaint (R. 12) with Petitioner's refused instructions 16 and 17 (R. 113-115) which direct a finding of liability if the hypothesized facts are found. The facts alleged in paragraphs 4-15 were repeated and realleged in paragraph 17, the first paragraph of Count II, and were not lost when Count I for tortious interference with business relations was dismissed (R. 6, 20, 141).

Legal theory is revealed in motions and arguments to the court. Petitioner's legal theory was that the relationships between the Globe-Democrat and Milne Circulation Sales, petitioner's customers, and Kroner constituted combinations or conspiracies in violation of Section 1 of the

Sherman Act; but that in any event the Globe-Democrat by going beyond prior announcement and mere declination and engaging in other actions to effect adherence, entwining others with it in doing so, had as a matter of law created an unlawful combination between itself and petitioner. This theory of law clearly appears in Petitioner's motion for a directed verdict (R. 105). It is clear in Petitioner's objection to that part of the court's charge which defined "combination" as requiring an element of common purpose, and in Petitioner's refused instructions 25, 26 and 27 (R. 113, 119-120). It clearly appears again in Petitioner's motion for judgment n. o. v. (R. 135).

When the court, in conference on instructions declined to accept Petitioner's legal theory on "combination," Petitioner elected to go to the jury only on the issue of combination in order to eliminate from the court's instructions the further emphasis on common purpose contained in conspiracy instructions (R. 111, 141). This created a discrepancy between a complaint alleging conspiracy and combination and instructions based only on combination. It was for this reason that the court required Petitioner to amend the complaint if conspiracy instructions were to be stricken from the charge. The substitution of "plaintiff's customers and/or Milne Circulations Sales, Inc. and/or George Kroner" for ". . . a person or persons unknown to plaintiff," made in response to Respondent's objection of vagueness, was incidental (R. 110-111). In any event this change could have no effect whatever upon Petitioner's legal theory that the Globe-Democrat's actions, however it was entwined with these others, created an unlawful combination between it and Petitioner. This changed wording in the complaint certainly could not withdraw that legal issue from the case; and it could not withdraw the alleged and proven facts showing that the Globe-Democrat went far beyond prior announcement and mere declination.

Whether combination was created between Petitioner and the Globe-Democrat, as a result of its actions, is wholly a conclusion of law. To require that a conclusion of law must be pleaded in order to be available as a ground for reversal, especially where as here, it was made a ground for motion for directed verdict, objections to evidence, and motion for judgment n. o. v., would be to defeat the purpose of modern code pleading.

Further, the conclusion of law that an unlawful combination was created between the Globe-Democrat and Petitioner is not "antithetical to" a conclusion of law that unlawful conspiracies or combinations were formed between the Globe-Democrat and others entwined with it (Resp. Br. 13). The latter supplements the former. The independent pricing decisions of the Petitioner are the object of the Sherman Act's protection. It is entirely consistent to adopt the theory that the Act says that these independent decisions shall not be destroyed by actions of others who are joined in combination or conspiracy, and that they shall not be destroyed by actions of others who are not joined in combination or conspiracy if the actions go beyond the narrow limits of customer selection. This, in fact, is what this court has held. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 43.

III.

Going Beyond Prior Announcement and Mere Refusal to Sell Is Unlawful and Can Not Be Excused by Arguments of Lesser Harm to the Buyer.

Respondent argues (Resp. Br. 18-20) that going beyond "simple refusal to sell" and employing "other means to effect adherence to his resale prices," is transformed into "stopping short of" simple refusal to sell because the Petitioner was not hurt as much by being bludgeoned into compliance as he would have been by simple refusal to

sell. In the first place the antitrust law protects the customer's independent pricing judgment. If it were true that the consequences of his standing on that right would be disastrous for him, this fact would not make innocent (and indeed the Respondent seems to feel even praiseworthy) the seller's destructive coercion.

In the second place Respondent engages in obvious misrepresentation as accompaniment for his crocodile tears. A simple refusal to sell would not have wiped out Petitioner's investment in his route, as Respondent alleges (Resp. Br. 19). It would have meant that after a certain date he could no longer buy papers from the Globe-Democrat in order to fulfill the contracts of delivery with his twelve hundred customers. But only Petitioner would have had the right to deliver the Globe-Democrat to those customers. It is these contracts of delivery that the carrier receives when he buys a "route." The carrier to whom the Globe-Democrat has refused to sell papers in the future still owns his route. He is an independent businessman, as the Globe-Democrat expressly stated in its policy regarding news dealers and carriers (R. 56-58). After he has been refused further service a carrier's route is worth a substantial amount of money to another. Petitioner, who had mortgaged his home to buy his route for $11,000 in 1956 (Resp. Br. 19), could have sold it for $24,000 after being refused service in 1964, but for the unlawful action of the Globe-Democrat in withholding the 300 customers purloined from him (R. 50). The undisputed facts show that a "simple refusal to sell" would have resulted in the Petitioner receiving $24,000 for the route that had cost him $11,000 originally.

Amicus points out (Amicus Br. 2-7) that newspapers have an interest in raising circulation and consequently advertise, promote, and solicit in order to gain new subscriptions which often are transmitted to the carrier through the newspaper (Amicus Br. 3). This is true, but

once the subscription is turned over to an independent merchant carrier the contract of delivery is the carrier's. In the instant case the Globe-Democrat's officers repeatedly said they were not in the carrier business and did not want to be in it (R. 71-76, 83-87, 91-97). Even when the Globe-Democrat took away 300 of Petitioner's subscribers by the actions herein, it asserted no proprietary interest in these contracts of delivery, and gave them without charge to another carrier (R. 96-97, 99). How could it possibly by a "simple refusal to sell" transfer to itself the ownership of all of a carrier's contracts of delivery, and thus "wipe-out" his total investment?

IV.

Petitioner's Submitted Instructions Did Not Agree With the Trial Court's Requirement of an Element of "Common Purpose" in "Combination".

To the extent that Respondent deals with the merits of the issue before the Court (Resp. Br. 24-30), he presents nothing not already covered in Petitioner's brief, except the assertion that Petitioner's own proffered instructions agreed with the trial court's requirement of an element of "common purpose" in "combination". This is false, as is clearly shown by Petitioner's requested instructions 25, 26 and 27, which Respondent neglects to mention (R. 119-120).

V.

Amicus Curiae Wholly Ignores the Undisputed Facts of This Case and States Irrelevant General Rules of Law About Termination, Prior Publication and Alternative Competitive Means of Distribution.

The background facts stated by Amicus (Amicus Br. 4-7) show that newspapers have an interest in increasing readership so that they can charge higher advertising

rates. From that point on it is difficult to see why the American Newspaper Publishers Association asked to file a brief herein since it wholly ignores the facts in this case.

1) Amicus says that a seller may refuse to sell to a customer who has filed suit against him, even if termination is for retaliation (Amicus Br. 8-9). Both of the cases cited premise legality upon the termination not being part of an unlawful conspiracy or combination. **Dart Drug Corp. v. Parke, Davis & Co.**, 344 F. 2d 173 (D. C. Cir., 1965), **House of Materials, Inc. v. Simplicity Pattern Co.**, 298 F. 2d 867 (2d Cir. 1962). The undisputed facts show that the Globe-Democrat's termination was an integral part of coercion resulting in an unlawful combination. Suit was filed Aug. 12, 1964 (R. 1, 47). Notice of termination was given Aug. 21, 1964 (R. 48, 49). On September 15, 1964, the Globe-Democrat continued its attempts to persuade Albrecht to resume delivering its newspaper provided he would agree to charge its suggested price (R. 50-51).

2) Amicus says that prior publication of suggested home delivery prices is not a violation of the Sherman Act (Amicus Br. 9-10). Petitioner has conceded this at every stage, but the undisputed facts show that the Globe-Democrat went far beyond prior announcement and mere refusal to sell.

3) Amicus says that a publisher's use of alternative competitive means of distribution is not restraint of trade (Amicus Br. 10-15). The undisputed facts show that the Globe-Democrat did not compete with Petitioner in the delivery of newspapers and did not authorize anyone else to compete with him. Competition is distinguished from wrongful injury by whether the person taking custom from another has intent to gain profits for himself and to continue in business for himself, and not just tempo-

rarily in order to injure another. Rest. of Torts, § 709; **Tuttle v. Buck** (1909), 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599. It has been recognized that in order for the right to compete to be a defense to a claim of violation of Section 1 of the Sherman Act, the actions must meet the common law and Restatement definition of bona fide competition. **Package Closure Corp. v. Sealright,** 141 F. 2d 972, 978 (2d Cir. 1944). The undisputed facts show that the Globe-Democrat had not been in the carrier business; did not want to be; had no equipment or employees for the carrier business; had no thought of making a profit from delivering to the customers it took from Petitioner; asserted no proprietary interest in the contracts to deliver to those subscribers; made delivery to them for a very short time on a make-shift basis; turned them over without charge to a carrier for whom it had advertised, with the understanding that he would have to give them back if Petitioner came into line on resale price; and the Globe-Democrat's sole and only purpose was admittedly to force Petitioner to adhere to its suggested resale price (R. 71-76, 83-87, 91-97). The Globe-Democrat was not competing. It did not authorize the other carrier, Kroner, to compete within Petitioner's route. Kroner did not go in and get his own contracts of delivery on the basis of the price and service he offered. The Globe-Democrat took 300 customers from Petitioner as coercion, and turned them over to Kroner in order to continue the coercion, but with the condition that if the coercion worked and Petitioner should "get straightened up" with the Globe-Democrat, Kroner would have to return the 300 customers (R. 71-76). Kroner did no solicitation for customers within Petitioner's route (R. 79).

VI.

Coercion Which Goes Beyond Prior Announcement and Mere Refusal to Sell Is Combinatory, Not Unilateral.

Amicus states that Section 1 of the Sherman Act does not prohibit unilateral action (Amicus Br. 15-19). This is unexceptionable. The question is whether the Globe-Democrat's actions were unilateral. This court has said that when a seller goes beyond prior announcement and mere refusal to sell and employs other means to effect adherence to his resale price policy, his actions are combinatory, not unilateral. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 43. Petitioner has shown that this distinction between unilateral action and unlawful combination is necessary if the purpose of the antitrust laws is to be achieved in resale price maintenance cases (Petr. Br. 24-30).

VII.

The Doctrine of Freedom of the Press Does Not Immunize Respondent's Actions Herein.

Amicus contends that freedom of the press immunizes the Globe-Democrat's actions herein (Amicus Br. 19-21). If there is any violation of the First Amendment here, it was committed by Respondent in interfering with Petitioner's right to deliver newspapers, for it is Petitioner, not Respondent, who is engaged in the business of delivering newspapers.

Amicus' self-serving conclusions that Petitioner's charges were "excessive" (10 cents per month more than Respondent's suggested price) and its contentions that "such overcharging creates chaos in the circulation system" (Amicus Br. 12, 20) (only 6 customers out of 1200 cancelled because of Petitioner's price) are completely at variance with the Record. In any event it cannot be

seriously argued that freedom of the press necessarily includes freedom to set the resale price of newspapers by means that violate the antitrust laws.

VIII.

No Special Facts About Newspapers Take Them Out of the Rule That Price Fixing Is a Per Se Violation of the Sherman Act.

Amicus argues that the peculiar facts of this case, including "the history of newspaper and periodical pricing, the newspaper's effort and investment in the development of subscription lists, the economic importance of pricing policy, the injury to newspapers resulting from low circulation revenue and the relation of circulation volume to advertising revenue . . ." call for non-application of the rule that price fixing is a "per se" violation (Amicus Br. 21-23). The short answer to this contention is that the factual premises on which Amicus relies can not be found in the Record of this case. A more complete answer is that even were such facts to be found in the Record they would not furnish newspapers immunity from conduct proscribed by the Sherman Act.

While it may well be true as Amicus contends that 75% of newspaper revenue is derived from advertising and only 25% from circulation; that a publisher's primary product is advertising and not the paper distributed by the carrier; that advertising rates are governed by circulation; that price increases affect circulation,—nevertheless, these factors do not give newspapers a license to fix or maintain the prices at which independent contractors may sell newspapers which they purchase outright from the publishers and sell to their own customers. That the pricing of newspapers is a critical economic consideration to newspapers furnishes no reason for sheltering them from the reach of the Sherman Act. Nor can Respondent

in truth claim that its actions taken against Petitioner for the admitted purpose of maintaining its suggested retail price were intended to protect consumers by fostering competition—they were clearly for Respondent's own selfish ends. If Respondent determined that its advertising revenues would increase if the carriers of its newspapers sold at a price higher than its present suggested price, can there be any doubt that it would take action to accomplish a higher retail price? There are no unique facts about the home delivery carrier business that would justify removing it from the pervasive sweep of this Court's rule that to fix a price is to restrain trade, without regard to the effect on competition or whether the price is held down supposedly for the benefit of the consumer. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150; **Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.**, 340 U. S. 211.

Amicus contends that a publisher must be free to determine the means by which it will distribute its newspapers. Here Respondent has exercised that right of choice. Prior to May 26, 1961, the carriers were employees of Respondent under a collective bargaining agreement with a union, but Respondent advised the union that it no longer regarded the carriers as employees but that they are independent contractors. Respondent then refused to negotiate a new collective bargaining agreement and the prior agreement expired May 26, 1961, and was never renewed (R. 53-55, 58). Of course, while Respondent was the employer of the carriers it set the price at which newspapers would be sold to subscribers. Now, however, Respondent seeks to continue to fix, control and maintain the prices at which its newspapers are sold to the public even though the carriers are no longer employees but are admittedly independent contractors. This is not an exceptional situation in which the Globe-Democrat is in fact acting in the public interest and fostering

competition, but is an ordinary case of vertical price fixing in violation of Section 1 of the Sherman Act.

Respectfully submitted,

By .....

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I, Gray L. Dorsey, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 27th day of October, 1967, I served 2 copies of the foregoing Brief for Petitioner on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By .....
Gray L. Dorsey,
Member of the Bar of the United States Supreme Court.